

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	3
Argument	7
Conclusion	9

CITATIONS

Cases:

Barrett v. *Virginian Ry. Co.*, 250 U. S. 473	6, 7, 9
Bronx Brass Co. v. *Irving Trust Co.*, 297 U. S. 230	6, 7
Cincinnati Traction Bldg. Co. v. *Pullman-Standard Car Mfg. Co.*, 25 F. Supp. 322	8
Cleveland v. *Mercantile Trust Co.*, 45 F. Supp. 205	8
Evans v. *Teche Lines*, 112 F. 2d 933	8
Hawkinson, Paul E., Co. v. *Goodman*, 32 F. Supp. 732	8
Home Owners' Loan Corp. v. *Huffman*, 134 F. 2d 314	8
Jones v. *Securities Commission*, 298 U. S. 1	7
Lawson v. *Moore*, 29 F. Supp. 175	8
McGowan v. *Columbia River Packers' Assn.*, 245 U. S. 352	7
Pullman's Car Co. v. *Transportation Co.*, 171 U. S. 138	7
Skinner & Eddy Corp., Ex parte, 265 U. S. 86	7
United States v. *Commercial Solvents Corp.*, 25 F. Supp. 653	8
United States v. *Lyman*, 36 F. Supp. 53	4
United States v. *Lyman*, 125 F. 2d 67	5, 8, 9
Walker v. *Spencer*, 123 F. 2d 347, certiorari denied, 316 U. S. 692	8

Miscellaneous:

Federal Rules of Civil Procedure:	
Rule 41	2
Rule 60 (a)	4, 8
3 Moore, *Federal Practice*, Secs. 41.02 and 41.03, pp. 3039, 3042	7

564795—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 495

FRANK W. LYMAN ET AL., EXECUTORS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 26–27) is not as yet reported. An opinion of that court on a prior appeal on the same point is reported at 125 F. 2d 67.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 18, 1943. (R. 28.) The petition for a writ of certiorari was filed November 22, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the filing of an answer by the petitioners, which raised the statute of limitations as a defense to the first cause of action contained in the declaration, vested substantive rights in them and precluded the District Court, upon motion of the Government under Rule 41 (a) (2) of the Federal Rules of Civil Procedure, from thereafter dismissing the first cause of action without prejudice to the prosecution of a timely proceeding pending in another court on the same subject matter.

RULE INVOLVED

Federal Rules of Civil Procedure:

> RULE 41. DISMISSAL OF ACTIONS.
>
> (a) *Voluntary Dismissal: Effect Thereof.*
>
> (1) *By Plaintiff; By Stipulation.*—Subject to the provisions of Rule 23 (c) and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal signed at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or any state an action based on or including the same claim.

(2) *By Order of Court.*—Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

* * * * *

STATEMENT

On June 28, 1938, the Government filed a declaration in the United States District Court for the District of Massachusetts for the recovery of income taxes for the years 1930 and 1931 and of estate taxes from petitioners as executors of the estate of Jesse P. Lyman, deceased. The complaint contained four separate causes of action, or counts, each based upon a different assessment. (R. 3–7.) The instant petition for a writ of certiorari concerns the disposition of the first cause of action only.

Petitioners filed an answer to the complaint on July 18, 1938, which, among other things, raised the defense of the statute of limitations to the first cause of action (R. 8). When the case came

on for trial on November 19, 1940, without a jury, Government counsel admitted in his opening statement that the suit was not timely as to the first cause of action and, with the court's permission and petitioners' assent, orally withdrew that cause of action from the suit (R. 8, 20). When, at the conclusion of the Government's case, Government counsel stated that "the Government has withdrawn its first cause of action" and petitioners' counsel asserted that it was his understanding that a stipulation to that effect was to be prepared and filed, the court stated that it was unnecessary to file a stipulation—that the first cause of action was "clear out of this case" (R. 21–22). Petitioners then made a motion for a directed verdict on the cause of action (R. 8–9, 22), whereupon the court stated that the motion was improper, reiterating that the first cause of action was "not before" him and that "We are trying this case as if we never heard of any first count" (R. 22). Judgment was entered for the Government on counts 2, 3, and 4 on December 13, 1940, without any mention of count 1 (R. 9–10). The judgment stated, however, that it was entered "In accordance with the opinion of the court handed down this day" (R. 9), which, in turn, stated that the first cause of action "is waived by the government" (R. 16). *United States* v. *Lyman,* 36 F. Supp. 53 (Mass.).

Subsequently, on March 28, 1941, petitioners filed a motion under Rule 60 (a) of the Federal

Rules of Civil Procedure for judgment on the first cause of action and amendment of the record accordingly, asserting that "by error or mistake it does not appear of record herein that judgment was given to the defendants on the first cause of action * * *" (R. 10). Three days later, the court, *ex parte,* allowed the motion and ordered that the original judgment of December 13, 1940, be amended to add "Judgment on the first count for the defendant with prejudice and without costs" (R. 10–11).

The Government then filed a motion to vacate the *ex parte* order amending the original judgment (R. 11–14). The motion was made for the reason, revealed in the motion, that the first cause of action was the subject of action in a pending proceeding in the Probate Court of Middlesex County, Massachusetts, and that if the amended judgment were permitted to stand the Government's claim in that proceeding would be forever barred, resulting in damage to the Government in the amount of $32,520.90, with interest from May 5, 1931 (R. 13–14). The District Court denied the motion on May 13, 1941 (R. 14). The Government appealed, and on January 23, 1942, the Circuit Court of Appeals vacated the order amending the original judgment and remanded the case to the District Court with leave to the Government to move for an order allowing it to dismiss the first cause of action. *United States* v. *Lyman,* 125 F. 2d 67 (C. C. A. 1st).

The Government then filed in the District Court a motion to dismiss the first cause of action (R. 14). The motion was granted, and judgment was entered dismissing the cause of action with prejudice to the commencement of another proceeding upon that cause of action and without prejudice to the right of the Government to prosecute any other timely proceeding then pending in another court upon the same subject matter (R. 15). The judgment was affirmed on appeal (R. 26–28), and it is the validity of this judgment which is involved in the instant case.

ARGUMENT

Petitioners assert that Rule 41 (a) (2) of the Federal Rules of Civil Procedure (*supra,* p. 3) does not authorize a dismissal under the circumstances of this case. Their contention is that the filing of an answer raising the statute of limitations as a defense to the first cause of action vested property and substantive rights in them of which they could not be deprived without violation of the due process clause of the Constitution (Br. 7–12). The contention is plainly lacking in merit.

The right of a plaintiff to dismiss his cause of action is a matter of procedure and practice. *Barrett* v. *Virginian Ry. Co.,* 250 U. S. 473, 476; *Bronx Brass Co.* v. *Irving Trust Co.,* 297 U. S. 230, 232. Prior to the effective date of the Federal Rules of Civil Procedure, a plaintiff in an action at law had the unqualified right of dismissal at any time before verdict, if not before

judgment, unless some plain, legal prejudice would result to the defendant other than the mere prospect of a second litigation upon the same subject matter. *Jones* v. *Securities Commission,* 298 U. S. 1, 19–20; *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, 92–94; *Barrett* v. *Virginian Ry. Co.,* 250 U. S. 473, 476. If the governing state practice so permitted, the right to dismiss, which this Court has stated "is substantial," could be exercised even after the trial court had indicated an intention to direct a verdict for the defendant. *Barrett* v. *Virginian Ry. Co., supra,* pp. 476–478. In an action in equity, the complainant had the same unqualified right at any time before final hearing, except when the case had proceeded to such a stage that the defendant was in a position to demand an opportunity to seek affirmative relief and would be prejudiced if remitted to a separate action. *Jones* v. *Securities Commission, supra; Ex parte Skinner & Eddy Corp., supra,* p. 93; *Bronx Brass Co.* v. *Irving Trust Co., supra,* p. 232; *McGowan* v. *Columbia River Packers' Assn.,* 245 U. S. 352, 358; *Pullman's Car Co.* v. *Transportation Co.,* 171 U. S. 138, 145–146.

Rule 41 (a) (2) of the Federal Rules of Civil Procedure (*supra,* p. 3) is based upon, and clarifies and restricts, this former practice in law and equity (3 Moore, *Federal Practice,* Sections 41.02 and 41.03, pp. 3039, 3042), making the right of dismissal after the service of an answer subject to the discretion of the District Court if no

stipulation of dismissal is filed. *Home Owners' Loan Corp.* v. *Huffman,* 134 F. 2d 314 (C. C. A. 8th); *Walker* v. *Spencer,* 123 F. 2d 347 (C. C. A. 10th), certiorari denied, 316 U. S. 692; *Evans* v. *Teche Lines,* 112 F. 2d 933, 934 (C. C. A. 5th); *Cleveland* v. *Mercantile Trust Co.,* 45 F. Supp. 205, 207–208 (Md.); *Paul E. Hawkinson Co.* v. *Goodman,* 32 F. Supp. 732, 734 (S. D. Cal.); *Lawson* v. *Moore,* 29 F. Supp. 175 (W. D. Va.); *United States* v. *Commercial Solvents Corp.,* 25 F. Supp. 653 (Del.); *Cincinnati Traction Bldg. Co.* v. *Pullman-Standard Car Mfg. Co.,* 25 F. Supp. 322 (Del.). The dismissal may, under the express provisions of the rule, be without prejudice to the commencement or continuation of another suit involving the same subject matter.

In the instant case, the first cause of action was withdrawn before trial, with the District Court's permission and petitioners' assent. As the Circuit Court of Appeals stated on the first appeal in this case (*United States* v. *Lyman,* 125 F. 2d 67, 70), the failure of the District Court to enter a formal order allowing the dismissal of the cause of action was an "oversight" which the court was empowered, by Rule 60 (a) of the Federal Rules of Civil Procedure,[1] to correct at any time. And,

[1] Rule 60 (a) provides:

"Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

as the same court held on the second appeal (R. 27), the District Court clearly did not abuse its discretion by dismissing the first cause of action without prejudice to the prosecution of any timely proceeding pending in another court on the same subject matter. On the contrary, it is manifest that petitioners are contesting the dismissal solely in an attempt to gain "an obviously undeserved windfall" (*United States* v. *Lyman,* 125 F. 2d at p. 70), of over $32,000 by application of the doctrine of *res judicata* in the pending proceeding in the Probate Court of Middlesex County, Massachusetts, on the same subject matter (see *supra,* p. 5; Br. 11).[2]

CONCLUSION

The case was correctly decided below and involves no conflict of decisions. The petition should be denied.

Respectfully submitted.

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DECEMBER 1943.

[2] It is immaterial, of course, that the formal order dismissing the first cause of action was entered after the entry and vacation of judgment on that cause of action. See *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, 478.

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